January 2-6 1872

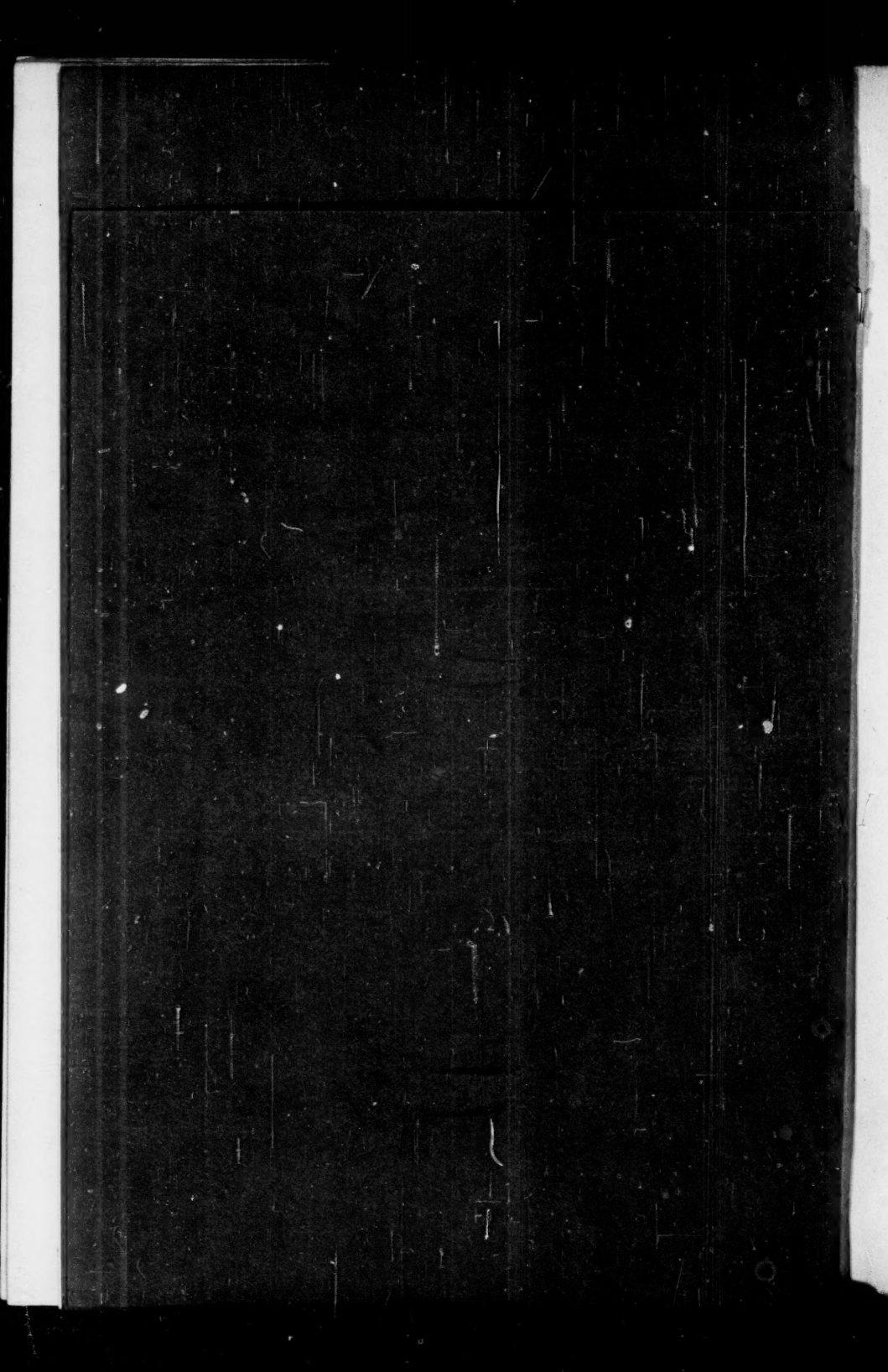
SUPREME COURT OF THE UNITED STATES.

No. 8.—ORIGINAL.

EX PARTE: IN THE MATTER OF HENRY W. LOUD, PETITIONER.

PETITION FOR WRIT OF PROHIBITION TO THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED DECEMBER 15, 1871.



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1 Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION OF Henry W. Loud, for a writ of prohibition to the district court of the United States for the eastern district of New York, in the second circuit.

To the honorable the Supreme Court of the United States:

The petition of Henry W. Loud, of the city of New York, respectfully shews—

That he is owner of the schooner Nellie of New York, her tackle, apparel, and furniture; that, in the month of August last past, the said schooner was owned by your petitioner, and was engaged in the coasting trade of the United States; that, during the said month, the said schooner was bound from New Haven, in the State of Connecticut, to the City of New York, by way of Long Island Sound and Hell
2 Gate; that, while on the passage, and before entering Hell Gate, one George A. Schofield, a Hell-Gate pilot, offered his services to pilot the said vessel through Hell Gate, whose services were declined, and he performed no service to or on board said vessel; that, on the nineteenth day of August, one thousand eight hundred and seventy-one, the said George A. Schofield filed his libel of complaint against the said schooner Nellie, her tackle, apparel, and furniture, in the district court of the United States for the eastern district of New York, claiming that, by virtue of the statutes of the State of New York, he was entitled to recover half pilotage; that a copy of his libel of complaint is hereto annexed, marked Exhibit A; that upon the filing of the said libel, a process was issued out of and by said court, and delivered to the marshall of the United States, a copy of which process is hereto annexed, marked Exhibit B; that your petitioner thereupon appeared in said action
3 and claimed said vessel, and having given the necessary stipulation the said vessel was delivered to him; that, afterwards, and on the twenty-third day of August, one thousand eight hundred and seventy-one, your petitioner filed his answer in said action, a copy of which is hereto annexed, and marked Exhibit C, and said action remains at issue undisposed of.

Your petitioner further shews that he is advised and believes that the said cause of action is not within the admiralty and maratime jurisdiction of said district court, and that said court has no jurisdiction to hear and determine said action upon its merits.

Your petitioner further shews that he is further informed and believes that his honor the district judge of the said district court, has judicially determined that said court has jurisdiction to hear and determine similar actions upon the merits, and is about to hear and dispose of this action in a similar manner, unless restrained by a writ of prohib-
4 ition issued by this honorable court; that the amount claimed in and by the libel of complaint in this action is only the sum of twelve dollars, and from a decree for said amount no appeal will lay to the circuit court for said circuit.

And your petitioner is further informed and believes that he is without remedy, except by a writ of prohibition to be issued by this honorable court, directed to said district court, forbidding and restraining it from further proceeding in said action.

And your petitioner therefore prays that this honorable court would

be pleased to issue its writ of prohibition, directed to the district court of the United States for the eastern district of New York, or his honor the judge thereof, prohibiting the said court, and the said judge thereof, from proceeding in the said action in said court, or for such other and different relief in the premises as shall be just.

And your petitioner will ever pray.

H. W. LOUD.

5 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry W. Loud, the petitioner in the foregoing petition named, being duly sworn, says that he has heard the foregoing petition read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and that as to those matters he believes it to be true.

H. W. LOUD.

Sworn before me this 23d day of Nov'r, 1871.

[SEAL.] JAMES C. VOORHEES,
Notary Public N. Y. Co.

6 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Samuel T. Jones, clerk of the district court of the United States of America for the eastern district of New York, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, this 21st day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the said United States the ninety-sixth.

[SEAL.] SAMUEL T. JONES, *Clerk.*

7 EXHIBIT A.

To the Honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

The libel and complaint of Geo. A. Schofield, Hell-Gate pilot, of said district against the schooner "Nellie," her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein in a cause of contract, civil and maritime, and thereupon the libellant alleges, and articulately propounds as follows:

First. That the said schooner is now in this district and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Second. That, during the times hereinafter mentioned, the libellant was a pilot, duly licensed to pilot vessels, by way of Hell Gate, to and from the port of New York.

Third. That, during said times, the said schooner "Nellie" was an enrolled vessel, and over one hundred tons burthen, as per enrollment, and, at the time of offering the services, hereinafter mentioned, was drawing twelve feet of water, and was about to navigate the channel known as Hell Gate, bound from Belfast, Maine, to the port of New York.

8 Fourth. That, on or about the 17th day of August, in the year one thousand eight hundred and seventy-one, the said libellant descried the said schooner in Long Island Sound at a point off Hempstead Bay in said sound, and thereupon put off to and hailed said schooner, and duly offered his services to the master, or person in command thereof, to pilot said vessel through said Hell Gate Channel.

That the said master, or person in charge, refused to allow libellant to take command or pilot said vessel through said Hell Gate Channel.

Fifth. That libellant was the first pilot so offering and tendering his services to pilot said vessel through said channel of Hell Gate.

Sixth. That there became due to the libellant on account of the premises, and in pursuance of the statutes in such cases made and provided, the sum of twelve dollars, which said sum, although due and demanded, has never been paid to libellant, or any part thereof.

Seventh. That payment has been demanded & refused.

Eig'th. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore libellant prays that process in due form of law may
9 issue against said schooner "Nellie," her tackle, apparel, and furniture, and that all persons having, or pretending to have, any interest therein may be cited to appear, and answer all and singular the matters so as aforesaid propounded, and that this honorable court would be pleased to pronounce for the claim aforesaid and costs, and condemn the said schooner, her tackle, apparrel, and furniture, to be sold to pay the same, and *and* for such other or different relief in the premises as shall to law and justice appertain.

JARVIS McCLENNON, *Att'y.*
GEORGE A. SCOFIELD.

Sworn to before me this 19th day of August, 1871.

SAM'L B. CALDWELL,
Notary Public, Kings Co.

WILCOX & HOBBS,
Proctors for Libellant.
WILCOX,
Advocate.

10 (Indorsed:) U. S. district court, eastern district. Geo. A. Scofield vs. the sch'r "Nellie," her tackle, &c. Libel. Wilcox & Hobbs, l'b'l't's proctors. Filed August 19, 1871.

11 EXHIBIT B.

EASTERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the eastern district of New York, greeting:

Whereas a libel hath been filed in the district court of the United States for the eastern district of New York, on the 19th day of August, in the year of our Lord one thousand eight hundred and seventy-one, by George A. Schofield vs. The Schooner "Nellie," her tackle, , for pilotage, (am't claimed $12 00) for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said sch'r or vessel, her tackle, &c., may be cited in general and special,

to answer the premises, and all proceedings being had that the said sch'r or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said schooner or vessel, her tackle, &c., and to detain the same in your custody, until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the eastern district of New York, on the 23d day of August, 1871, at twelve o'clock noon, of the same day, if the same shall be a day of jurisdiction, otherwise, on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness the Honorable Charles L. Benedict, judge of the said court, at the city of Brooklyn, in the eastern district of New York, this 19th day ot August, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-sixth.

[L. S.] SAMUEL T. JONES, *Clerk.*

WILCOX & HOBBS,
Proctor for Libellant.

(Indorsed:) Vol. , page . Eastern district of New York. United States district court. George A. Schofield vs. The Schooner "Nellie," her tackle, . Monition ret'ble August 23d, 1871. Wilcox & Hobbs, proctor for libellant. Filed the 23d day of Aug't, 1871.

I hereby depute C. Carpenter to execute the within process.
Dated August 19th, 1871.

S. R. HARLOW,
U. S. Marshal.

12 In obedience to the within monition, I attached the vessel therein described, on the 19th day of August, 1871, and have not given due notice to all persons claiming the same, that this court will, on the 23d day of August, 1871, inst., (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

S. R. HARLOW,
U. S. Marshal.

Dated August 23d, 1871.

13 EXHIBIT C.

To the Honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

The answer of Henry W. Loud, claimant and respondent to the libel and complaint of George A. Schofield, against The Schooner "Nellie," her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein in an alleged cause of contract, civil and maritime; and thereupon the respondent answering, alleges, and articulately propounds as follows:

First. The respondent denies each and every allegation contained in the first article of the said libel.

Second. That this respondent has no knowledge as to the several allegations contained in the second article of the said libel, and therefore denies the same, and leaves the libellant to make such proof as he may be advised it is material and necessary for him to make.

Third. This respondent admits the several allegations contained in the third article of the said libel, except the said schooner was bound from *Dural* Haven to New York, and respondent has no information as to offers of service except as hereinafter stated.

14

Fourth. This respondent, upon information and belief, denies each and every allegation contained in the fourth article of the said libel, except where the same is hereinafter specifically admitted; that, on the day mentioned in the said fourth article, the said schooner was in Long Island Sound, bound to the city of New York, and when outside Sands Point a small boat approached the course of said schooner, and some one in the said boat hailed those on board the said schooner, and asked if a pilot was wanted, to which a negative reply was given by the master thereof, but that no service was offered; and whether the person hailing was the libellant, whether it was a pilot at all, this respondent has no knowledge, as the person so hailing neither alleged he was a pilot, nor did he exhibit any evidence that he was such a pilot.

Fifth. This respondent states, upon information and belief, that the first hail the said schooner had was the one mentioned in the next preceeding article, but whether it was the libellant this respondent has no information, and therefore denies the same.

Sixth. This respondent denies the allegation contained in the sixth article of the said libel.

15

Seventh. That this respondent admits the allegations contained in the seventh article of the said libel.

Eighth. This respondent denies that this action is founded upon contract, civil and maritime, but is an action to recover a penalty imposed by the law of a State, and he submits that if all the facts alleged in the said libel were true they constitute no lien upon the said schooner, and are not within the jurisdiction of this court, and he prays the same benefit and advan'age as if he had expressly excepted to the said libel.

Ninth. This respondent denies each and every allegation contained in the eighth article of the said libel.

Wherefore the respondent prays that this honorable court would be pleased to pronounce against the libel aforesaid, and otherwise right and justice to administer in the premises, and that this honorable court would be pleased dismiss this respondent, with his reasonable costs in this behalf most wrongfully sustained.

J. W. FRENCH, *Master.*

Sworn to before me this 22d day of August, 1871.

[L. S.] JAMES C. VOORHEES,
Notary Public, N. Y. Co.

BEEBE, DONOHUE & COOKE,
Proctors.

BEEBE, *Advocate.*

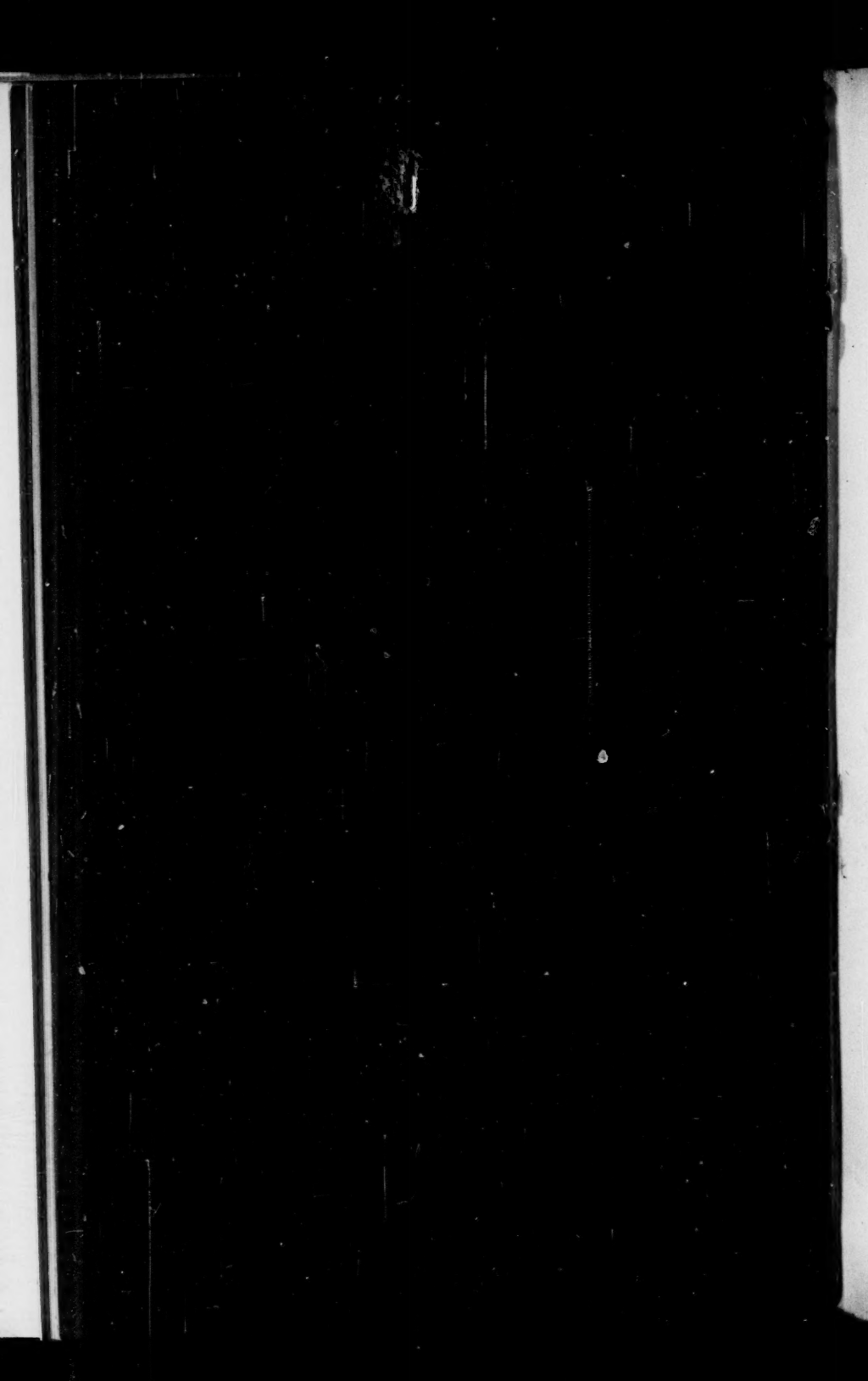
16

(Indorsed:) U. S. district court. The Schooner "Nellie," her tackle, &c., ads. Geo. A. Schofield. Answer. Beebe, Donohue & Cooke, proctors for lib'l'ts. Filed August 23d, 1871.

17 (Indorsed:) U. S. Supreme Court. In the matter of the application of Henry W. Loud, for writ of prohibition to the district court of the United States for the eastern district of New York, in the second circuit. Petition. Beebe, Donohue & Cooke, attorneys. Schofield vs. The Nellie.

(Indorsement on cover:) No. 8. Ex-parte: In the matter of Henry W. Loud, petitioner. Petition for writ of prohibition to the judge of the district court of the United States for the eastern district of New York.

Filed 15th December, 1871.



Supreme Court,

OF THE UNITED STATES.

In the Matters of the several Applications of HENRY W. LOUD and ALEXANDER S. MCNEIL

for

Writ of Prohibition,

This motion is made for a prohibition to the District Court of the United States for the Eastern District of New York, to prohibit the further proceeding in a cause now pending in which the papers show.

That a libel was filed in that Court on the nineteenth day of August 1870 by libellant against the schooner "Nelly" the libellant, setting forth that he was a Pilot licensed by New York State as a Pilot by way of Hell Gate, that the vessel proceeded against was bound from New Haven to New York That the libellant offered his services to pilot the vessel, and that the master refused his offer. That the libellant was the first pilot who offered.

On this the claimant of the vessel proceeded against and attached, asks for the prohibition on two grounds.

First. That the Court does not possess any jurisdiction of the cause of action stated.

Second. That no lien exists on the vessel enforceable in the Admiralty Court.

All the *facts* not conclusions stated by the libel, of course for the purposes of the motion must be admitted.

The subject of Admiralty jurisdiction in general has received such a thorough and exhaustive examination both at the bar and by this Court so recently in the Case Insurance Co. *vs.* Dunham. That it would be useless to go over it again here ; and the argument in the case will be confined to the case before the Court simply referring to that case for a general discussion on the subject.

The claim advanced by the libellant below is under the laws of the State of New York. See laws N. Y., 1865, Ch. 115, Sec. 4, amending Sec. 10 of old act. And the first question necessarily arises is what power the State had or has to make that law and what effect it now has. We submit.

First.—That no power whatever existed at any time in the State after the adoption of the Constitution for passing such laws.

The power thus exercised is clearly a regulation of commerce both between the States and with foreign nations.

This power is an exclusive one Gibbons *vs.* Ogden 9, Wheaton 1.

Where for the great purposes of the Union these powers were given to the United States. They are given absolutely, and it is neither consistent with the dignity of the nation or the safety of it that the powers most directly needed for the purposes of the Federal Government should be permitted to be exercised by the State.

How inconsistent with the dignity of a nation, that a foreign ship trading to our ports finds her pilotage regulated by all the different states of the Union different in each port, and in some cases where states join on pilotage ground subjected to the quarrels and bickerings of the different pilot regulations. When a vessel comes by Samdy Hook to New York the master connot tell whom to employ, a Jersey pilot or New Yorker; both claim the right.

It is respectfully submitted that almost all the difficulties of commerce complained of by merchants in the United States arise from the non-exercise by the United States of its proper powers in this and similar respects.

Second.—But we shall be told by our opponents that the state has that power delegated by an act of congress, 1 Stat. at large, 34, sec. 4; 5 Stat. at large, 153, sec. 1, 5, and that the case of the Board of Wardens *v.* Cooley, 12, How., recognizes this power. We say in answer, that with deference to that opinion the power delegated to the General Government by the grant of power to regulate commerce cannot be delegated by the United States, and that

all acts delegating or attempting to delegate it are void. The people in their power, or the states in their power, whichever it may be, have delegated power to one general government, and that the delegation was made with a full knowledge of what it was; and it does not rest in the Federal Government to fritter away that power by a division of it, or permitting the states to use it. As well might the United States delegate to the states a concurrent right to make war, or establish post roads, or coin money, or allow the states, in the absence of a declaration of war by Congress, the right to make it.

That Congress supposed the states had no power without their sanction to legislate about pilotage is shown by the very existence of the acts attempting to vest the right in the states, and if no power existed to delegate the right to the states then these acts are void, and no power passed under them to the state.

Third.—But supposing the states did take any power under these acts, then the exercise of the power to regulate pilotage to any extent by the United States at once ousts the state of all right in the matter. It is not a question whether Congress covered the whole ground in the acts to regulate pilotage which Congress has passed. It is sufficient that the U. S. has legislated on the subject; what they have legislated is all that is required.

Sec. 10 Stat. at Large, 61.
14 Stat. at Large, 228, sec. 9.

The authorities to show that where in cases in which in the absence of the United States legislation the State could act, the action of Congress to any extent excludes state legislation, are :

City of New York *v.* Miln 8 Peters 118
People *v.* Brooks, 4 Denio, 477.
Brown *v.* State of Maryland, 12 Wheat, 419.
7 How., 392.

It is hardly necessary to point out, that should it be established that both State and United States may act in such matters, States will be separately claiming the right to establish P. O. post roads, where they claim none exist in the United States; and in the absence of Federal acts, they may establish them and there on so many instances in which this question can arise, and the State attempt to regulate, that a brief will hardly be a proper place to specify them. The case of S. S. Com. *vs.* Phila., 2 Wallace, 450, may be cited against us, but we submit it was not by a full Court; that question should be considered an open one. 6 Wallace 34 cited in the opinion is directly with us, the State cannot compel payment where service is not performed.

Fourth.—It is submitted, that if any power as to Pilots is grantable at all to the States, no permission can be inferred from the act Stat. at L. 54, § 4, to make the taking of a pilot compulsory on vessels, or in the absence of taking a pilot, to make it a penalty.

The act simply confers on the State, the right to regulate *pilots*, not pilotage, or what ships shall take pilots.

Fifth.—The statute of the State in this case, literally discriminates in the kind of vessels, both as to steam, where they are going, as to size, and as to what papers they are sailing under, which is clearly a discrimination the Constitution will not permit the State to make. In all these respects, the act of the State certainly goes beyond its sphere and must fail, See § 4; § 10 Act 1865.

Supposing the Court to hold that the act of the State is valid, and that in a proper Court under that act, the libellant might recover, then we submit the proper forum is not the admiralty.

Sixth.—The demand is really for a penalty, and while some expression in the case of s. s. Com. *vs.* Joliffe, 2 Wallace, used by the Judge who delivered the opinion of the majority of the Court, is to the contrary, yet is submitted, that on authority, the claim is a penalty.

On principle, when a man asks another to pay him for what he is not asked to do, what there is no contract to do, it can be nothing but a penalty. As well might an ordinance of a corporation, that any man who did not sweep his flues every month, should

pay $5, be considered as a contract with the State to pay that sum if he failed to do it. The Admiralty Court exercising its powers as such, between individuals, can show no such authority as to entertain such a claim in the nature of a penalty.

Seventh.—No State statute can confer jurisdiction on the Admiralty, or make a cause of action which was not before known in the Admiralty, cognizable in that Court. ~~See~~

The admiralty is an exclusive grant, and the States can neither make Admiralty Courts or admiralty contracts.

The Moses Taylor.
Add Hines.

Here it is submitted, no case is produced in the Admiralty ~~where~~ where such a claim is set up as that for the cause of action here set forth, Benedict's Admiralty speaks of and gives precedent for *pilotage*. See § 289, Bend, and it is submitted that one who has so long and so ably struggled for and upheld admiralty jurisdiction as Mr. Benedict would have claimed this right if it existed.

Eighth.—It is submitted that the admiralty by all the cases in the books, by all elementary writers, it at least seems to be considered that the Admiralty

have jurisdiction in but actions of contracts and actions of tort. This claim is neither. It would be a hard day for the Courts when any State or Legislature could make a law that the refusal of a ship wanting repairs to employ the first mechanic who offered. A ship wanting seamen who refused to employ the first that offered should be held to have contracted with the first who offered to them. This claim certainly is not a tort. Certainly not one of which Admiralty has jurisdiction.

His honor, Judge Benedict, refers to cases of salvage as being neither tort or contract. The answer is that in such cases the party sued receives the services, and salvage is, after all, but a *quantum meruit* for a service performed in estimating which the Court takes the facts into account.

Ninth.—No power exists in the District Court to issue process for this claim; their power is given by rule 14 of the Supreme Court, and if, as held, in the St. Lawrence & Potomac, the Court's amendment of the 12th rule cuts off a jurisdiction of the Court in rights before possessed, and that the 12th rule as it stands ousts jurisdiction; clearly pilots have no right to process on such claims as this, as the rule gives them process for pilotage only.

Tenth.—The amount in this one case as small, but the exaction on commerce are onerous, and merchants are

everywhere met with exactions, the smallness generally of which are pleaded as the reason for the imposition, but unless some one submits it to proper authority, where are such exactions to end. From the very smallness of the amount this motion is the only way with safety to all parties that the question can be settled. And it is not passing beyond the proper limits of brief to say that this application is submitted with the full approbation of the Court below. That as the cases are all of a small character, and thousands of them are arising in the course of a year, on which, unless in this way, no final decision can be had, with the Judge's assent, this course is taken.

Eleventh.—The statute on which this action is brought gives no lien for this penalty, or attempts to do so, supposing it to be even admitted as a contract between the parties to employ the libellant no lien existed. Even for charters or other maritime contracts, when the parties do not enter into performance, a mere offer on the one side and refusal on the other side to perform gives no lien, see Vanderwater *vs.* Mills, 19 How.

We submit the prohibition should issue, and the further action of the Court below be stayed.

C. Donohue
of Counsel

Tenth.—The amo
action on com

U. S. District Court.

ALEXANDER S. BANTER,

vs.

ALEXANDER S. MCNEIL.

BENEDICT, J.

This case presents for decision but a single question of law. It is an action by a pilot against the owners of the bark "Maggie McNeil" to recover half pilotage. The evidence shows the tender of the service as alleged, and also the refusal of the service by the master, and that the libellant was the first pilot who made such a tender. The only question in the case is as to the right of the libellant to maintain such an action in the Admiralty to recover the half pilotage which he became entitled to demand upon the facts proved.

This question is new in this Court: If the demand be pilotage, or within the principles applied to pilotage strictly so called, no doubt can be entertained as to the libellant's right to recover in this action, for it was long ago decided that the pilotage is within the jurisdiction of the Admiralty. But this demand is said to be simply a demand for a penalty created by a State law.

The law referred to is the pilot act of the State of New

York, which contains the usual provision for half pilotage, a feature so common in pilot laws that it is not necessary more fully to describe it here.

This statute of the State has never been adopted as a national law by any statute of the United States.

The Act of August 7th, 1789, only adopts the statute of the States then in force, and does not include the present Act, and the declaration that "pilotage shall continue to be regulated in conformity with such laws as the States may respectively hereafter enact for that purpose," which is contained in that Act, has no effect to adopt future laws of the States, but simply to manifest the understanding of Congress that the power to legislate upon the subject is not exclusive in the United States. Cooley *vs.* Board of Wardens, 12, H. 320.

Congress never having legislated upon this subject, the statute of the State of New York referred to is therefore a valid enactment within the power of the State to make.

It is therefore the rule of decision between these parties in this Court, and its legal effect was to render the defendant debtor to the libellant for the half pilotage here demanded.

The half pilotage which becomes due and payable under such circumstances has been distinctly held by the Supreme Court not to be a penalty, but a sum due on contract for services. In the Steamship Co. *vs.* Jelleffe, (2 Wal. 450), it is decided that although half pilotage be given by the statute, it is only in consideration of services rendered, and is recoverable notwithstanding

the subsequent repeal of the statute, upon the ground that where a right has arisen upon a contract or a transaction in the nature of a contract authorized by statute the repeal of the statute does not effect it.

Again in a later case—Steamship Co. *vs.* Port Wardens, (6 Wal. 34,) it is declared "that the right to recover half pilotage rests not only on State laws, but upon contract.

Pilotage is compensation for services performed. Half pilotage is compensation for the services which the pilot has put himself in readiness to perform by labor, risk and cost, and whioh he has actually offered to perform.

According to these decisions, then, the defendants are liable to the libellant upon a contract to pay him for his services in boarding the vessel and making tender of his services to pilot their vessel to New York.

The only question remaining is whether such a contract be maritime and within the jurisdiction of the Admiralty. And first, it is to be remarked that although the State Stutute fixes the amount of compensation to be paid, this does not destroy or change the nature and character of the transaction.

The amount due for wharfage is in general fixed by statute, but the demand is none the less within the jurisdiction of the Admiralty. And so too it was held in Hobart *vs.* Doogan, (10 Pet. 120), in regard to pilotage proper, that the only effect of the State Statute, fixing the amount, was to limit the recovery in Admiralty to the sum recoverable under the State laws, without affect-

ing the jurisdiction. The jurisdiction depends upon the character of the contract.

Now, it is evident from the opinion of the Supreme Court in Steamship Co. *vs.* Port Wardens, (6 Wall, 34,) that the contract for half pilotage is considered by that Court to be similar in character to a contract for pilotage, nor can I see how any distinction can be drawn between these, two classes of demands under the view taken by the Supreme Court. The service, the labor and risk in reaching and boarding the vessel for which half pilotage is paid, are clearly maritime in character; in fact, they form part of the service for which full pilotage is paid when the pilot is taken.

The liability to pay for these services is created in the interest of navigation—the safety of the vessel is the thing sought to be obtained, and by the service the ship actually derives the advantage of an opportunity to be piloted by an experienced pilot. These are the features of a maritime contract.

But it is urged, that if the case be not one of penalty, it is no more than a case arising *quasi ex contractu*, and such cases have not as yet been held to be maritime contracts within the meaning of the constitution.

Cases arising *quasi ex contractu*, where the transaction in nature and effect appertains to navigation, are as clearly cases in admiralty, as cases depending upon voluntary agreements. It has been the constant practice of the Admiralty to entertain proceedings arising either *ex contractu*, or *quasi ex contractu*, or *delictó*, or *quasi ex delicto* (the Mazurka, 2 Curt., 77), as one instance.

Cases of salvage may be mentioned which are not cases of contract, and certainly not of *tort* (the Eagle, 8 Wat., 23), such cases from the beginning of navigation have been conceded to be within the jurisdiction of the Admiralty. Moreover, salvage awards are not compensation for services rendered, and do not depend upon the *quantum meruit;* they are rewards, which the maritime law, in the interest of commerce, declare shall be given under certain circumstances.

If, then, it were true that this action is simply to recover a penalty, there would not be wanting foundation to claim that it could properly be imposed by a Court of Admiralty.

No reason is seen why, if salvage, which is a maritime reward, be within the jurisdiction, a maritime penalty should not be. Indeed, maritime penalties imposed as punishment by maritime Courts, are a common and characteristic feature of the jurisdiction. The three months' extra wages decreed for an unlawful discharge of a seaman, is a statutory penalty, in part at least, for the use of the Government (Emerson *vs.* Howland, 1 Mas., 49). The forfeitures which are imposed upon seamen are mulcts for misconduct, inflicted by Courts of Admiralty in accordance with ancient rules of the maritime law (the Elizabeth Froth, 1 B. and H., 202).

The offences of drunkenness, theft, quarrelling, and desertion, have all been thus punished by Courts of Admiralty, time and time again. These instances are referred to here, not because I sustain this case as one of penalty—but because they tend to show that there is

nothing new or strained, in holding that a liability, arising from the law, upon facts maritime in their character, may as well be enforced in a Court of Admiralty, as a liability produced by the consent of parties.

Let the decree be in favor of the libellant for the amount claimed.

U. S. Supreme Court.

In the Matter of the
Application of
ALEANDER MCNEIL, *et al.*,
for a
Writ of Prohibition.

Brief in Opposition to Motion.

The Writ of Prohibition is prayed for herein to restrain the District Court of the United States, for the Eastern District of New York, from proceeding in a certain action in admiralty, brought therein by Alexander S. Banter, as libellant, against the above named Alexander McNeil, et al., owners of the bark "Maggie McNeil," as respondents, for half pilotage.

The application is based upon the ground that the said District Court had no jurisdiction of the action.

A decree in favor of the libellant was rendered on the eighteenth day of March, 1871, for twenty-three dollars, exclusive of costs.

These facts are proven, and for the purposes of this motion admitted by the respondents:

That at the time mentioned in the libel, the libellant was a duly licensed "Hell Gate" Pilot, under the laws of the State of New York. That on the night of the twenty-seventh day of February, 1870, it being dark and snowing, the libellant put off to the vessel and tendered his services to the master, to pilot the boat to the port of New York by way of Hell Gate, the vessel being bound on a voyage from Providence, Rhode Island, by way of Long Island Sound and New York, to New Orleans, Louisiana; and at the time the services were so offered was about to navigate the channel known as Hell Gate, into the port of New York. The services of the libellant were refused, and he was obliged to put back to shore. The vessel at the time was a registered vessel, foreign to the State of New York, and drawing ten feet of water. The libellant was the first pilot offering his services. Payment for the half pilotage claimed, was demanded, and refused.

The only question for this Court to determine, is one of law, as to the right of the libellant to maintain such an action in admiralty, to recover the half pilotage which he became entitled to demand, upon the above facts.

The opinion of the learned Judge before whom this case was tried and determined, is so exhaustive of the subject as to leave counsel but little to add. (See opinion annexed.)

We submit—

I.

This Court will not entertain the motion for a Writ of Prohibition, for these reasons:

(*a*) The writ should not be issued for the sole purpose of establishing a principle.

United States v. Hoffman, 4 Wallace, 158.

(*b*) The intent of the Judiciary Act was to leave to Courts of original jurisdiction all adjudications where the matter in dispute did not exceed the sum of two thousand dollars (as well questions of jurisdiction as all others), and it is believed the Writ of Prohibition has never been prayed for, or allowed, except in cases where the amount in controversey brought the case within the appellate jurisdiction of this Court, and then only when the remedy by appeal would, for some reason shown, have been inoperative.

United States v. Peters, 3 Dall., 121.
Bronson v. La Crosse, 1 Wall., 405.
United States v. Hoffman, 4 Wall., 158.

(*c*) A Writ of Prohibition cannot issue from the Supreme Court where there is an apellate power given by law.

Ex parte Gordon, 1 Black, 503.

(*d*) In this case the Court has actually proceeded; there is nothing for this Court to prohibit.

United States v. Hoffman, 4 Wall., 158.

II.

This Court has passed on the merits of this motion, in the cases cited by the learned Jndge below, in his opinion.

Cooley v. Board of Port Wardens, 12 Howard, 312.
Steamship Co. v. Joliffe, 2 Wall., 450.
Steamship Co. v. The Port Wardens, 6 Wall., 34.

In the last case above cited (6 Wall., 34) Chief Justice Chase says: "*The right to recover pilotage and* HALF PILOTAGE, *as prescribed by State Legislation, rests not only on State laws, but on contract. Pilotage is compensation for services performed;* HALF PILOTAGE *is compensation for services which the pilot has put himself in readiness to perform by labor, risk and cost, and which he has actually offered to perform.*" It is for this "*labor, risk and cost*" this action is brought.

It is contended, however, that there must be a request or promise to pay for this "labor, risk and cost," and services the the pilot has performed. But Judge Field, in Steamship Co. vs. Joliffe (2 Wallace, 457), on this point remarks as follows; "*In that large class of transactions designated in law as implied contracts, the assent or convention to which is an essential ingredient of an actual contract, is often wanting, but the law consulting the interests of morality implies one, and the liability thus arising is said to be a liability on an implied cuntract. The claim for half pilotage fees stands upon substantially similar grounds.*" We may add, the approach of a vessel to pilot grounds is the signal to the vigilant pilot that his services are required. This pilotage regulation, custom, or law, is universally known, and with full knowledge of this, if the master voluntarily places himself in a position where services will be rendered, and actually are rendered on this account, can he plead there was no request for services.

The claim herein being, then, one arising on contract, it makes no difference whether it is one fixed and expressed by law or by the parties themselves.

The only remaining question is whether the transaction is one maritime in its nature. This is answered fully in the case of the Insurance Co. vs. Dunham (11 Wallace, 1), where Judge Bradley holds, at page 29, that the test is not where the contract was made or to be performed, but its subject matter, if that was maritime the contract was maritime, and Judge Bradley holds this to be "*the established doctrine of this Court.*" The true criterion is whether the transaction had reference to maritime service, maritime casualties, &c.

Pilotage service has always been held to be a matter of admirality jurisdiction, and pilotage services are the services, and all the services generally performed by pilots. They have reference to the safety of the vessel and services performed by the pilot in venturing out, as the libellant in this case did, on a dark and snowy night, and risking his life to extend the security—which alone his skill and experience could afford, to a vessel as she was entering on the perils of a dangerous navigation, were as much for the safety of the vessel as the services thereafter to be rendered by him, in actually directing the vessel. Every act done for a vessel, every stick of timber entering into its construction, has for its end and object the SAFETY of the vessel, and Courts of Admiralty afford parties a remedy in such cases. The law fixes the value of these services, under the acts commonly called half pilotage acts, at half what the pilot would be entitled to if the remaining service had been performed.

But these State acts in no way effect the jurisdiction of this Court (Hobart vs. The Dragon, 11 Peters, 120.) They simply limit the amount of the recovery. The Chief Justice, in case of Steamship Co. vs. The Port Wardens (6 Wall., 34) holds the claim for these services rests not alone on the State act, *but on contract*, and so, if indeed the State act created a penalty, the point raised by the learned Counsel for the respondent, that, his action was to recover a penalty provided for by the State act cannot avail. This Court holds: our claim exists independent of State statute.

But this action is not brought to recover for a penalty—

(*a*) As is fully shown by the cases cited above.

(*b*) The language of the Statute herewith submitted, in no way indicates it was the intent of the Legislature to create a penalty, and, as Judge Benedict in his opinion remarks, its legal effect is to render the respondent debtor to libellant for the half-pilotage here demanded.

The points that the action is brought to recover for a penalty, and if not for a penalty, then it arises *ex quasi contractu*, are fully met by the learned Judge below. (See latter part of opinion.)

III.

The motion for a Writ of Prohibition should be denied.

F. A. WILCOX,

Of Counsel opposed to Application.

In the Matter of the

Opposition to
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HELLGATE

PILOT LAWS,

AS

Passed April 15, 1847,

AND

AMENDED, MARCH 12, 1860,

MARCH 14, 1865, APRIL 16, 1868,

AND APRIL 5, 1871.

NEW-YORK.
Charles D. Tuttle, Printer and Stationer,
COR. BROAD AND FRONT STS.

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The points that the action is brought to recover for a penalty, and if not for a penalty, then it arises *ex quasi contractu*, are fully met by the learned Judge below. (See latter part of opinion.)

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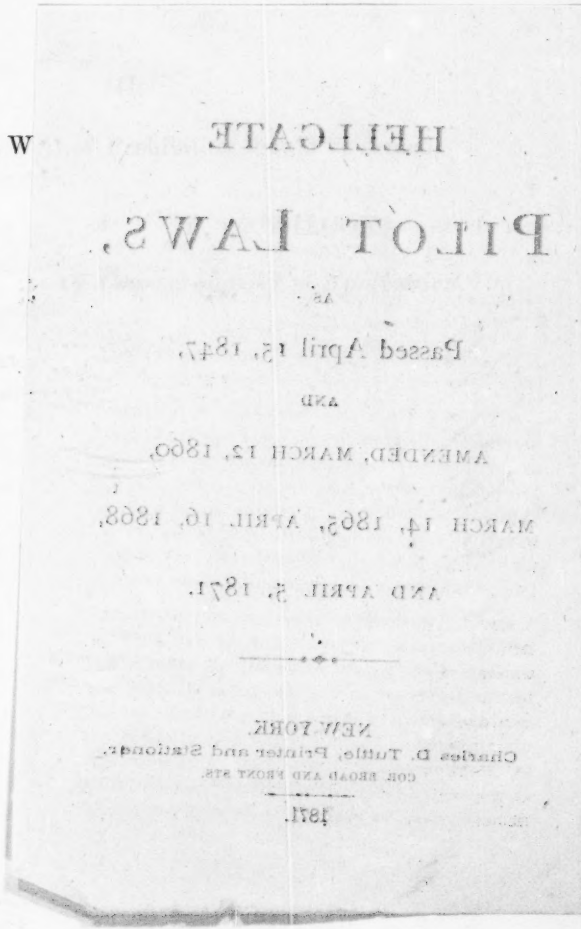

In the Matter of the

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AN ACT

CONCERNING THE PILOTS OF THE CHANNEL OF THE EAST RIVER, COMMONLY CALLED HELLGATE, PASSED APRIL 15, 1847, AS AMENDED MARCH 12, 1860, MARCH 14, 1865, APRIL 16, 1868 AND APRIL 5, 1871.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. There shall be appointed, in manner hereinafter directed, fit and proper persons, to act as pilots, for the safe pilotage of vessels through the channel of the East River, commonly called Hellgate, who shall be known as Hellgate pilots, and hold their offices during good behavior; and all those who are now pilots by the way of Hellgate, shall be considered as pilots under this Act.

SEC. 2. All pilots hereafter to be appointed, shall be appointed by the Governor, by and with the consent of the Senate, and shall be commissioned by the Governor, in like manner as all other persons appointed to office by him with the consent of the Senate. It shall be the duty of the Board of Wardens of the Port of New York, to recommend such suitable and experienced persons to act as such pilots, as shall apply for such recommen-

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The points that the action is brought to recover for a penalty, and if not for a penalty, then it arises *ex quasi contractu*, are fully met by the learned Judge below. (See latter part of opinion.)

The motion for a W

dation, and to make a list of the person or persons so recommended; which list shall be transmitted to the Governor of the State, whose duty it shall be to present the same to the Senate, for their confirmation or rejection. And in making the selection of names for said list, they shall be chosen, first, from those now acting as deputy pilots; and secondly, from those now acting as apprentices, who have served the time required by their indentures of apprenticeship, and who have passed or shall pass the necessary examination, and shall have acted for two years as deputy pilots; and thirdly, from those who are now apprenticed, after they shall have served the time required by their indentures, passed the requisite examination, and acted for two years as deputy pilots. All apprentices shall hereafter serve as such for the period of three years, and until they attain the age of twenty-one years, and shall act two years in addition as deputy pilots after that period, and after they have passed the requisite examination and received from the Board of Wardens a certificate entitling them to serve as such deputy pilots; all apprentices shall hereafter be examined twice during the last year of their apprenticeship, before the Board of Wardens of the Port of New-York, whose duty it shall be to examine the said apprentices, in the presence of at least two of the Hellgate pilots, who shall be invited to attend at, and assist in,

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said examination; and the indentures of all apprentices under this Act, shall be filed in the office of the Board of Wardens within ten days after the same shall have been executed.

SEC. 3. The Board of Wardens of the Port of New York, shall have power and authority to make and establish such rules, orders and regulations, not inconsistent with the Constitution and laws of this State, or of the United States, or of the provisions of this Act, for the better government of said pilots; and with such fines and penalties for the breach thereof, as the said Board of Wardens may, from time to time, direct; and to revoke, annul or alter the same as often as they may deem proper and expedient. Said Board of Wardens shall have such rules, orders and regulations entered at length upon the minutes of said board, and shall furnish to each of said pilots a copy of said rules, orders and regulations, and shall furnish each of said pilots with a copy of any additional rule, order or regulation, or of any abrogation, alteration or amendment thereof.

SEC. 4. Said Board of Wardens shall have cognizance of all complaints made against any or either of said pilots, for official misconduct. Upon the reception of any complaint as aforesaid, against either of said pilots, it shall be the duty of said Board of Wardens to furnish the pilot complained

The points that the action is brought to recover for a penalty, and if not for a penalty, then it arises *ex quasi contractu*, are fully met by the learned Judge below. (See latter part of opinion.)

The motion for a W

of with a copy, in writing, of said cause of complaint; which copy shall contain, as near as may be, a full specification of the charges preferred against said pilot, with a notice affixed thereto, of the time (not less than six days), and place, when they, the said Board of Wardens, may or shall require said pilot to appear before said board, to answer the charges made against him; but no charges shall be received, unless the same is verified by the oath of the person prefering the same. Upon said pilot appearing before the Board of Wardens, it shall be their duty to take testimony, and to examine into the facts and circumstances of the case; and if, after a full hearing of the case, and of competent proof tending to establish said charge, a majority of the whole Board of Wardens shall deem said pilot guilty of official misconduct, they, the said Board of Wardens, shall have full power and authority to suspend said pilot. It shall be the duty of said Board of Wardens, to transmit to the Governor of this State, within ten days after such suspension, a full account of their proceedings in the premises, with a copy of the complaint and specifications, and also a copy of the testimony taken in the case. It shall be the duty of the Governor, upon a review of the whole matter, either to remove the said pilot from office, or to annul or confirm his suspension, as to him shall appear just and proper in the premises.

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SEC. 5. It shall be the duty of the said pilots to keep two or more good and sufficient deck boats, of not less than twenty tons burthen, on the East River, and no more than seven pilots shall be interested in one deck boat, and no apprentice shall be taken by the said Hellgate pilots, but in the said deck boats; and no person, who is not a regularly licensed Hellgate pilot, shall own any part of any boat engaged in the said pilot business, under pain of a forfeiture of such parts or shares owned by him, to be sued for and recovered by the said Board of Wardens; and all deck boats, belonging to said Hellgate pilots, shall be registered in the office of the said Board of Wardens.

SEC. 6.* Any of the said Hellgate pilots, who shall pilot any vessel through the channel of the East River, commonly called Hellgate, may demand and receive from the master, owner, consignee or agent of said vessel, the following fees of pilotage, to wit: For every sloop and fore-and-aft schooner, one dollar and twenty five cents, for every foot of water such vessel may draw. For every square top-sail and stay-sail schooner, one dollar and seventy-five cents, for every foot of water such vessel may draw. For every hermaphrodite brig, brigantine and full-rigged brig, one dollar and seventy-five cents, for every foot of water said ves-

* As amended by §1, Ch. 115, Laws of 1865.

The points that the action is brought to recover for a penalty, and if not for a penalty, then it arises *ex quasi contractu*, are fully met by the learned Judge below. (See latter part of opinion.)

The motion for a W

sel may draw. For every ship and bark of one thousand tons burthen and under, two dollars, for every foot of water such vessel may draw; and when over one thousand, and not exceeding one thousand five hundred tons burthen, two dollars and twenty-five cents, for every foot of water such vessel may draw; and when over one thousand five hundred tons burthen, two dollars and fifty cents, for every foot of water such vessel may draw. Any pilot who shall perform any additional pilotage, besides that of piloting through the channel of the East River, commonly called Hellgate, and pilot the same vessel to Execution Rocks, or Sand's Point lighthouse, in Long Island Sound, outward bound, or who shall board any vessel at or to the eastward of Execution Rocks, or Sand's Point lighthouse, in Long Island Sound, on her inward passage through Hellgate, shall be entitled to an additional compensation of seventy-five cents per foot, for every foot of water the vessel may draw.

And any pilot who shall pilot a vessel inward, by the way of Hellgate, shall be entitled to a preference in the piloting of the said vessel outward bound, providing the said voyage be by the way of Hellgate. And further, from the first day of November to the first day of April, in every year, every such Hellgate branch pilot shall be entitled to demand and receive for every ship, bark, brig,

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square top-sail and stay-sail schooner, the sum of three dollars; and for every fore-and-aft schooner and sloop, the sum of two dollars, in addition to the rates of compensation for pilotage, hereby established. And any master or commander of any vessel, who shall give to such branch Hell-gate pilot an untrue account of the draft or tonnage of his vessel shall forfeit and pay the sum of fifty dollars, to be sued for and recovered by the Board of Port Wardens of New-York.

SEC. 7.* Any of said Hellgate pilots, who shall first tender his services, may demand and receive from the master, owner or consignee of any vessel of the burthen of one hundred tons and upwards, navigating the said channel of Hellgate, to whom he shall have tendered his service as a pilot, and by whom the same shall have been refused, whether inward or outward bound, one-half pilotage, for every foot of water such vessel may draw, which half pilotage shall be the one-half of the rates of compensation established by the sixth section of this Act. But such half pilotage shall not be chargeable to any vessel under one hundred tons burthen, sailing under a coastwise license, and shall not be chargeable more than once for the same passage to any vessel. And in case any such vessel under one hundred tons burthen, nav-

* As amended by Ch. 115, Laws 1865; and Ch. 298, Laws 1871.

The points that the action is brought to recover for a penalty, and if not for a penalty, then it arises *ex quasi contractu*, are fully met by the learned Judge below. (See latter part of opinion.)

The motion for a

igating the said channel to or from the port of New-York, shall make the usual signal for a pilot, and shall refuse to receive on board or employ such pilot, when he shall have tendered his services, then the master, owner or consignee of such vessel shall pay to such Hellgate pilot, such half pilotage from the place at which such pilot shall have so offered his services. And any pilot who shall pilot any government vessel through the said channel, shall be entitled to receive the same compensation therefor, as is now provided by law for like services, in piloting such vessel to or from the port of New-York, by the way of Sandy Hook.

SEC. 8. The master, owner or consignee of any ship or vessel to whom any Hellgate pilot shall have rendered, upon the request of the master of said ship or vessel, any extra service for the preservation of said ship or vessel, while in distress, shall pay to said pilot, in addition to the compensation set forth in the sixth section of this Act, such amount for extra services as the Board of Wardens shall determine to be a reasonable reward; and for every day which any Hellgate pilot shall be detained on board any ship or vessel, over and above twenty-four hours, he may demand and receive from the master, owner or consignee of said vessel, two dollars a day for each and every day he shall be so detained.

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SEC. 10.* This Act shall not be construed to apply to the passenger steamboats plying on regular passenger routes this side, or to the westward, of Cape Cod. And all foreign vessels and vessels under register, navigating the channel of Hellgate, who shall be spoken, shall be subject to the pilotage fees, as provided in section sixth, to the first pilot who tenders his services.

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SEC. 11.* All Acts, or parts of Acts, as are inconsistent with the provisions of this Act, shall be, and the same are, hereby repealed.

SEC. 12.† The provisions of section sixth of this Act, as amended by chapter 115 of the laws of 1865, and chapter 936 of the laws of 1867, are hereby continued in full force and effect until the first day of July, 1876. From and after the first day of March, 1871, it shall not be lawful for any Hellgate pilot to take any apprentice in his said trade or profession of Hellgate pilot.

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Application.

* As amended by Ch. 115, Laws 1865.

† As amended by Ch. 293, Laws 1871.

The points that the action is brought to recover for a penalty, and if not for a penalty, then it arises *ex quasi contractu*, are fully met by the learned Judge below. (See latter part of opinion.)

The motion for

RATES OF PILOTAGE.

SLOOPS AND SCHOONERS, FORE AND AFT.			BRIGS, STAYSAIL AND TOPSAIL SCHOONERS.		
Feet.	Rikers Island at $1.25.	Sand's Point at $2.00.	Feet.	Rikers Island at $1.75.	Sand's Point at $2.50.
5	$6.25	$10.00	5	$8.75	$12.50
6	7.50	12.00	6	10.50	15.00
7	8.75	14.00	7	12.25	17.50
8	10.00	16.00	8	14.00	20.00
9	11.25	18.00	9	15.75	22.50
10	12.50	20.00	10	17.50	25.00
11	13.75	22.00	11	19.25	27.50
12	15.00	24.00	12	21.00	30.00
13	16.25	26.00	13	22.75	32.50
14	17.50	28.00	14	24.50	35.00
15	18.75	30.00	15	26.25	37.50
			16	28.00	40.00

Winter Pilotage, $2.00 additional.

All Government Vessels, 7.50 per foot.

Winter Pilotage, $3.00 additional.

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SHIPS, BARKS AND STEAMERS, 1,000 TONS AND UNDER.			Winter Pilotage, $3.00 additional.
Feet.	Rikers Island at $2.00.	Sand's Point at $2.75.	
8	$16.00	$22.00	
9	18.00	24.75	
10	20.00	27.60	
11	22.00	30.25	
12	24.00	33.00	
13	26.00	35.75	
14	28.00	38.50	
15	30.00	41.25	
16	32.00	44.00	
17	34.00	46.75	
18	36.00	49.50	
19	38.00	52.25	
20	40.00	55.00	
21	42.00	57.75	

All Vessels over 1,500 tons, 2.50 per foot.

SHIPS, BARKS AND STEAMERS, 1,500 TONS AND UNDER.			Winter Pilotage, $3.00 additional.
Feet.	Rikers Island at $2.25.	Sand's Point at $3.00.	
10	$22.50	$30.00	
11	24.75	33.00	
12	27.00	36.00	
13	29.25	39.00	
14	31.50	42.00	
15	33.75	45.00	
16	36.00	48.00	
17	38.25	51.00	
18	40.50	54.00	
19	42.75	57.00	
20	45.00	60.00	
21	47.25	63.00	
22	49.50	66.00	
23	51.75	69.00	
24	54.00	72.00	
25	56.25	75.00	

The points that the action is brought to recover for a penalty, and if not for a penalty, then it arises *ex quasi contractu*, are fully met by the learned Judge below. (See latter part of opinion.)

The motion for

Rules and Regulations.

The Board of Wardens of the Port of New York, have adopted the following regulations for the government of Hellgate Pilots, viz:—

ARTICLE 1. The pilot who shall first board any vessel on the North River, coming from above Spuytendevil Creek, after leaving her place of loading, shall be entitled to the fees of pilotage, provided said vessel takes a pilot.

ART. 2. All vessels from Elizabethport, Newark and Amboy, to be governed by the same regulations as contained in Article 1.

ART. 3. The pilot first speaking any vessel coming into port, and tendering his services as pilot, shall be entitled to the fees of pilotage; provided such pilot shall not, at the time, have another vessel actually in charge.

ART. 4. In no case shall any one pilot take charge of, or pilot more than one vessel at the

In the Matter of the

same time, and in all cases shall be on board the vessel under his charge.

ART. 5. Any pilot, having a vessel in charge, and speaking one down the North River, shall give one of the two to the next pilot who may speak the vessel down the North River, provided both vessels go the same tide.

ART. 6. It shall be the duty of the pilots to keep not less than two good deck boats, of not less than twenty tons burthen each, in the East River.

ART. 7. It shall be the duty of the said pilots to submit to this board of Wardens, on or before the 10th day of May, in each year, a full report of the names of the pilots, deputy pilots and apprentices, with their residences, and the boats owned by them, with the names of their owner or owners, and their tonnage.

ART. 8. All disputes and controversies between said pilots, or between any two or more of them, unless settled among themselves, shall be referred to the Board of Wardens by either or all of the parties interested therein, by a complaint or statement in writing, which shall be signed and sworn to by the parties making the same; and the same shall be heard and determined by the board, after notice to all the parties of not less than five days;

The points that the action is brought to recover for a penalty, and if not for a penalty, then it arises *ex quasi contractu*, are fully met by the learned Judge below. (See latter part of opinion.)

The motion for

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the notice to the complainant may be verbal, notice to the respondent shall be in writing.

ART. 9. Any pilot having a vessel enga shall report himself on board of the vessel to captain or mates, at least twenty-four hours be the time of sailing, that he is ready to dischs the duty, or otherwise his claim to the vessel cease.

ART. 10. No pilot shall leave an incoming sel under his charge until her arrival at the tery, or her place of destination; nor an outg vessel until she arrives at the place designate law, without the consent of the master of s vessel.

ART. 11. Any violation of these rules shal reported to the Board of Wardens.

In the Matter of the
Application of
HENRY W. LOUD
for a
Writ of Prohibition.

Brief in Opposition to Motion.

We refer to our brief in matter of Alexander McNeil.

The cases differ only in this, that the suit in which the writ is prayed for has not proceeded to a decree, and that the action is *in rem*.

The application should not be granted.

F. A. WILCOX,

Of Counsel opposed to Application.

U. S. DISTRICT COURT.

ALEXANDER S. BANTER,

vs.

ALEXANDER S. MCNEIL.

BENEDICT, J.

This case presents for decision but a single question of law. It is an action by a pilot against the owners of the bark "Maggie McNeil," to recover half pilotage. The evidence shows the tender of the service as alledged, and also the refusal of the service by the master, and that the libellant was the first pilot who made such a tender. The only question in the case is as to the right of the libellant to maintain such an action in the Admirality to recover the half pilotage which he became entitled to demand upon the facts proved.

The question is new in this Court: If the demand be pilotage, or within the principles applied to pilotage strictly so called, no doubt can be entertained as to the libellant's right to recover in this action, for it was long ago decided that the pilotage is within the jurisdiction of the Admiralty. But this demand is said to be simply a demand for a penalty created by a State law.

The law referred to is the pilot act of the State of New York, which contains the usual provision for half pilotage, a feature so common in pilot laws that it is not necessary more fully to describe it here.

This statute of the State has never been adopted as a national law by any statute of the United States.

The Act of August 7th, 1789, only adopts the statute of the State then in force, and does not include the present Act, and the declaration that "pilotage shall continue to be regu-

lated in conformity with such laws as the States may respectively hereafter enact for that purpose," which is contained in that Act, has no effect to adopt future laws of the States, but simply to manifest the understanding of Congress that the power to legislate upon the subject is not exclusive in the United States. Cooley vs. Board of Warders, 12, H. 320.

Congress never having legislated upon this subject, the statute of the State of New York referred to is therefore a valid enactment within the power of the State to make,

It is therefore the rule of decision between these parties in this Court, and its legal effect was to render the defendant debtor to the libellant for the half pilotage here demanded.

The half pilotage which becomes due and payable under such circumstances has been distinctly held by the Supreme Court not to be a penalty, but a sum due on contract for services. In the Steamship Co. vs. Jelleffe (2 Wal. 450), it is decided that although half pilotage be given by the statute, it is only in consideration of services rendered, and is recoverable notwithstanding the subsequent repeal of the statute, upon the ground that where a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, the repeal of the statute does not effect it.

Again in a later case—Steamship Co. *vs.* Port Wardens, (6 Wal. 34,) it is declared "that the right to recover half pilotage rests not only upon State laws, but upon contract.

Pilotage is compensation for services performed. Half pilotage is compensation for the services which the pilot has put himself in readiness to perform by labor, risk and cost, and which he has actually offered to perform.

According to these decisions, then, the defendants are liable to the libellant upon a contract to pay him for his services in boarding the vessel and making tender of his services to pilot their vessel to New York.

The only question remaining is whether such a contract be maritime and within the jurisdiction of the Admiralty. And first, it is to be remarked that although the State Statute fixes the amount of compensation to be paid, this

does not destroy or change the nature and character of the transaction.

The amount due for wharfage is in general fixed by statute, but the demand is none the less within the jurisdiction of the Admiralty. And so too it was held in Hobart *vs.* Doogan, (10 Pet. 120,) in regard to pilotage proper, that the only effect of the State Statute, fixing the amount, was to limit the recovery in Admiralty to the sum recoverable under the State laws, without affecting the jurisdiction. The jurisdiction depends upon the character of the contract.

Now, it is evident from the opinion of the Supreme Court in Steamship Co. *vs.* Port Wardens, (6 Wall. 34,) that the contract for half pilotage is considered by that Court to be similar in character to a contract for pilotage, nor can I see how any distinction can be drawn between these, two classes of demands under the view taken by the Supreme Court. The service, the labor and risk in reaching and boarding the vessel for which half pilotage is paid, are clearly maritime in character; in fact, they form part of the service for which full pilotage is paid when the pilot is taken.

The liability to pay for these services is created in the interest of navigation—the safety of the vessel is the thing sought to be obtained, and by the service the ship actually derives the advantage of an opportunity to be piloted by an experienced pilot. These are the features of a maritime contract.

But it is urged, that if the case be not one of penalty, it is no more than a case arising *quasi ex contractu*, and such cases have not as yet been held to be maritime contracts within the meaning of the constitution.

Cases arising *quasi ex contractu*, where the transaction in nature and effect appertains to navigation, are as clearly cases in Admiralty, as cases depending upon voluntary agreements. It has been the constant practice of the Admiralty to entertain proceedings arising either *ex contractu*, or *quasi ex contractu*, or *delicto*, or *quasi ex delicto* (the Mazurka, 2 Curt., 77).

As one instance—

Cases of salvage may be mentioned which are not cases of

contract, and certainly not of *tort* (the Eagle, 8 Wat., 23,) such cases from the beginning of navigation have been conceded to be within the jurisdiction of the Admiralty. Moreover, salvage awards are not compensation for services rendered, and do not depend upon the *quantum meruit;* they are rewards, which the maritime law, in the interest of commerce, declare shall be given under certain circumstances.

If, then, it were true that this action is simply to recover a penalty, there would not be wanting foundation to claim that it could properly be imposed by a Court of Admiralty.

No reason is seen why, if salvage, which is a maritime reward, be within the jurisdiction, a maritime penalty should not be. Indeed, maritime penalties imposed as punishment by maritime Courts, are a common and characteristic feature of the jurisdiction. The three months' extra wages decreed for an unlawful discharge of a seaman, is a statutory penalty, in part at least, for the use of the Government (Emerson *vs.* Howland, 1 Mas., 49). The forfeitures which are imposed upon seamen are mulcts for misconduct, inflicted by Courts of Admiralty in accordance with the ancient rules of the maritime law (the Elizabeth Froth, 1 B. and H., 202).

The offences of drunkenness, theft, quarrelling, and desertion, have all been thus punished by Courts of Admiralty, time and time again. These instances are referred to here, not because I sustain this case as one of penalty, but because they tend to show that there is nothing new or strained in holding that a liability, arising from the law, upon facts maritime in their character, may as well be enforced in a Court of Admiralty, as a liability produced by the consent of parties.

Let the decree be in favor of the libellant for the amount claimed.

10 Pet 126

Clifford

In the Supreme Court of the United States.

DECEMBER TERM A. D. 1871.

MOTION FOR MANDAMUS.

Comes now W. Penn. Clarke, an attorney and counsellor of the court, and, for the reasons stated in the affidavit of John H. Russell hereto attached, moves the court here for an alternative writ of mandamus, directed to the Court of Claims, commanding the said court to vacate a certain order made by it in the cause entitled John H. Russell *vs.* The United States, No. 2928, allowing an appeal from the decision of said court overruling a motion for a new trial, which order was made on the 31st day of January, 1872, in violation of a mandate of this court, filed in said court of Claims on the 12th day of December, 1871, or, in default thereof, that the said court show cause, at a time to be named by this court, why the said order should not be vacated.

W PENN. CLARKE,—
Of Counsel for John H. Russell.

AFFIDAVIT OF JOHN H. RUSSELL.

THE DISTRICT OF COLUMBIA, *City of Washington*, } *ss.*

John H. Russell, of lawful age, on oath deposes and says: That on the 23d day of October, 1867, he filed in the office of the Court of Claims, his petition against the United States, claiming of the said defendant the sum of one hundred and eleven thousand eight hundred and fifty-

March 4 1872
Jas Madison

nine dollars and thirty-three cents, for the use of certain steamboats, and for damages to said boats, and for the seizure of the same by the said defendant, as from the said petition now on the files of this court on appeal, reference being had thereto, will fully and at large appear; that the said defendant appeared by its solicitors and attorneys and defended said action, and thereupon such proceedings were had in said cause, that afterwards, to wit, on the 6th day of December, 1869, the said Court of Claims rendered a judgment in favor of your affiant, and against the said United States, for the sum of forty-one thousand three hundred and fifty-five dollars and thirty-three cents.

This affiant further states, that on the 16th day of January, 1870, the said defendant, by its Assistant Attorney General, filed in said Court of Claims, an application for the allowance of an appeal from the said judgment to the Supreme Court, which said appeal was allowed by said court on the same day; that on the 5th of May, 1870, the record of the cause was transmitted to the Supreme Court by the clerk of the Court of Claims; that on the 1st of June, 1871, and fifteen months after the allowance of the appeal, the said defendant filed a motion for a new trial in said cause, and on the 18th of September, 1871, the said defendant filed additional reasons for said new trial; and that on the 11th of November, 1871, the said defendant filed in said court, a motion to stay the payment of the judgment.

This affiant further states, that on the 9th day of November, 1871, the said cause was tried in the Supreme Court on the appeal, and on or about the 20th of said month, a decision was rendered therein by said Supreme Court, affirming the judgment of the court below, and instructing the said Court of Claims to proceed to enforce the judgment in accordance with law.

This affiant further states, that on the 21st and 22d of November, 1871, and after the affirmance of said judgment by the Supreme Court, the motion for a new trial hereinbefore referred to, and a motion on the part of the defendant, to stay the payment of the judgment, were argued and submitted in the said Court of Claims—the said motions having been argued in said court before *four* of the judges thereof; and that on the 11th of December, 1871, the Assistant Attorney General, on behalf of the defendant in said cause, filed a motion to remand the said motion for a new trial to the law docket for re-argument.

This affiant further states, that on the 12th day of December, 1871, the mandate from the Supreme Court in said cause, bearing date November 27, 1871, affirming the said judgment of the said Court of Claims, was filed in said court, in open court.

This affiant further states, that on the 13th of December, 1871, Chief Justice Drake of said Court of Claims, announced the opinion of the court, granting a re-argument of the motion for a new trial before a full bench, Judges Peck and Nott dissenting, and the latter delivering an opinion, in which said two judges held, that inasmuch as the motion for a new trial had been argued before, and submitted to four of the judges, and inasmuch as the said judges were equally divided, the said motion for a new trial should be overruled; and that on the 19th day of December, 1871, the said motion for a new trial was ordered to be placed on the law docket for argument for January, 1872.

This affiant further states, that on the 29th day of January, 1872, after argument, the said Court of Claims "ordered that the said defendant's motion for a new trial be dismissed, for want of jurisdiction; because since the same was made, the mandate of the Supreme Court has been filed, affirming the judgment of the court in this

case; and because two of the four judges before whom the motion was argued, and to whom it was submitted, on the 21st of November, 1871, have heretofore rendered and filed their decision, that the motion be denied on the merits."

This affiant further states, that on the 31st of January, 1872, the said defendant, by its Assistant Attorney General, made application for the allowance of an appeal, from the decision of said Court of Claims, overruling the said motion for a new trial, which was allowed by the said court on said day; that on the 3d day of February, 1872, this affiant, by his solicitor, filed in said Court of Claims, a motion to vacate said order allowing said appeal, which motion is in the words and figures following, to wit:

"Comes now the claimant, by his solicitor, and moves the court here to set aside and vacate the order made in this cause on the 1st day of February, 1872, on motion of the defendants, allowing an appeal from the decision of the court overruling the motion for a new trial; and for cause thereof, shows to the court the following:

1. Because this cause having been once appealed to the Supreme Court, and the judgment therein affirmed, this court can only obey the mandate of said Supreme Court, now on file in this court, and carry it into execution.

2. Because, after a mandate from the Supreme Court, no re-hearing can be granted.

3. Because this cause was not pending in this court, or on appeal in the Supreme Court, when said motion allowing an appeal was granted."—

That the said motion to vacate said order allowing said appeal, on the 12th of February, 1872, was argued and submitted; and that on the 19th of said month, the said Court of Claims rendered a decision, overruling said motion, and refusing to vacate the said appeal.

This affiant further states, that all of the foregoing facts will appear from a transcript of the record and proceedings in said cause in said Court of Claims, duly certified by the clerk thereof, which is hereto attached and made a part hereof, marked Exhibit A; that in consequence of the allowance of said appeal, the Secretary of the Treasury, though requested so to do, refuses to pay the said judgment of this affiant against the United States; that as he is advised, and verily believes, the said order of the Court of Claims, allowing the said appeal, is in violation of law, and the authority of the Supreme Court of the United States; and in consequence thereof, he is delayed and injured in the collection of his said judgment; and that he has no speedy and adequate remedy at law, except by a writ of *mandamus* from the Supreme Court, in aid of its own jurisdiction and authority. And further he saith not.

JOHN H. RUSSELL.

Subscribed and sworn to before me, this 21st day of February, 1872.

JOHN RANDOLPH,
Asst. Cl'k Court of Claims.

W. PENN. CLARKE,
Of Counsel,

TRANSCRIPT OF RECORD.

EXHIBIT A.

In the United States Court of Claims.

JOHN H. RUSSELL
vs.
THE UNITED STATES. } No. 2928.

December 6, 1869. Chief Justice Casey delivered the opinion of the court. Judgment for the claimant for

forty-one thousand three hundred and fifty-five dollars, thirty-three cents ($41,355 33.) Loring, J., read a dissenting opinion.

February 16, 1870. Application for an allowance of an appeal filed by Mr. Talbot, Assistant Attorney General.

February 16, 1870. Ordered that the appeal be allowed.

May 5, 1870. Record on appeal sent up to the Supreme Court.

June 1, 1871. Motion for new trial filed by Assistant Attorney General.

September 18, 1871. Additional reasons for new trial filed by Assistant Attorney General.

November 11, 1871. Motion for order to stay payment of judgment filed by defendant, and claimant's counsel notified.

November 21 and 22, 1871. Motion for new trial argued and submitted, and motion to stay the payment of judgment submitted at same time.

December 11, 1871. The Assistant Attorney General filed a motion to remand the motion for a new trial to the law docket for re-argument.

December 12, 1871. Mandate from the Supreme Court, dated November 21, 1871, affirming the judgment of this court filed in open court.

December 13, 1871. Chief Justice Drake announced the opinion of the court granting a re-argument of the motion for a new trial. Judges Peck and Nott dissented. Judge Nott read an opinion.

December 19, 1871. This case was ordered to be placed on law docket for January, 1872.

January 29, 1872. Ordered that the defendants' motion for a new trial be dismissed for want of jurisdiction, because since the same was made the mandate of the Supreme Court has been filed affirming the judgment of the court in this case, and because two of the four judges

before whom the motion was argued, and to whom it was submitted on the 21st of November, 1871, have heretofore rendered and filed their decision, that the motion be denied upon the merits.

January 31, 1872. The defendants, by their Attorney General, now come and apply for the allowance of an appeal to the Supreme Court of the United States from the judgment of this court, in this case rendered on the 29th day of January, 1872.

WM. McMICHAEL,
Assistant Attorney General.

Filed January 31, 1872.

January 31, 1872. Ordered that the appeal be allowed as prayed for. BY THE COURT.

February 3, 1872. Comes now the claimant, by his solicitor, and moves the court here to set aside and vacate the order made in this case on the 1st day of February, 1872, on motion of the defendants, allowing an appeal from the decision of the court, overruling the motion for a new trial, and for cause thereof shows to the court the following:

1. Because this cause having been once appealed to the Supreme Court, and the judgment therein affirmed, this court can only obey the mandate of said Supreme Court, now on file in this court, and carry it into execution.

2. Because after a mandate from the Supreme Court no rehearing can be granted.

3. Because this cause was not pending in this court on appeal in the Supreme Court when said motion allowing an appeal was granted.

W. PENN. CLARKE,
Of Solicitors for Claimant.

Filed February 3, 1872, and referred to law docket.

February 12, 1872. Motion to vacate order allowing an appeal agreed and submitted.

February 19, 1872. The motion to vacate the appeal allowed on the defendants' application was denied. By THE COURT.

The foregoing are true transcripts from the general docket, the journal of the court, and of original motions on file in said cause.

Witness my hand and the seal of said Court of Claims this 20th day of February, 1872.

[SEAL.] JOHN RANDOLPH,

Assistant Clerk, Court of Claims.

BRIEF

On Motion for Alternative Writ of Mandamus against the Court of Claims.

I. The appeal from the order of the court overruling the motion for a new trial, should not have been allowed:

1. Appeals from the Court of Claims are only authorized in cases of *final judgment*.

Act of March 3, 1863, Sec. 5, 12 U. S. Stat. at Large, 765.

Act of June 25, 1868, Sec. 2, 15 U. S. Stat. at Large, 75.

The term final judgment, used in the statutes, does not mean the last act or order of the court in a cause, but that decision which determines the right of the parties, and virtually settles the litigation.

2. Burrill's Law Dic., 106.

II. A motion to grant a new trial is addressed to the sound discretion of the court, and the action of the court thereon cannot be assigned as error, and will not be considered by the appellate tribunal.

Barr vs. *Grag's Heirs*, 4 Wheaton, 213;
Blunt's Lessee vs. *Smith*, 7 Wheaton, 248;
Henderson vs. *Moore*, 5 Cranch, 11; Ib. 187;
Marine Ins. Co. vs. *Hodgson*, 6 Cranch, 206;
Wylie, Adm'r, vs. *Baldwin*, 14 Howard, 1.

III. The allowance of the appeal is a violation of the mandate of the Supreme Court.

The inferior court is bound to obey the mandate of the Supreme Court, and must carry it into execution.

Ex parte Libbald, 12 Peters, 488;
Ex parte Story, 12 Peters, 339;

Skellem's Ex'r's vs. *May*, 6Cranch, 267;
Chaires' Ex. vs, *Miranda*, 3 Howard, 611;
West vs. *Brashear*, 14 Peters, 51;
Cook vs. *Burnley*, 11 Wallace, 672;
Ex parte Dubuque and Pacific R. R., 1 Wall., 69.

The case last above cited is analagous to the case made on the motion now before the court.

IV. The second section of the act of June 25, 1868, above cited, does not change the law in relation to the right of appeal from the Court of Claims. The first section expressly confines the right of appeal to *final judgments*, and is thus in harmony with the right as conferred in the act of 1863. The second section *only extends the time within which the Government may exercise the right of appeal.* The extension is: 1. "While any suit or claim is pending before or on appeal from said Court" (of Claims); *or*, 2. "Within two years next after the final disposition" of any such suit or claim." Final disposition—where? In the Court of Claims. The act relates only to the Court of Claims, and the limitation is two-fold. If the two limitations were united by the conjunction *and*, instead of the preposition "*or*" the section would then bear the construction contended for by the Government.

The case was *not* "pending on appeal from said court," when the motion for a new trial was argued, and the court properly overruled the motion. Its jurisdiction over the cause terminated when the mandate of this court, showing that the judgment had been affirmed, was filed in that court, except so far as its action was required to carry the judgment into execution. And the cause not being *pending* there, the court had no power to grant the allowance of an appeal. Having erred in allowing the appeal, the order should have been vacated on the motion of the claimant.

The allowance of the appeal in a case not warranted

by law, and in violation of the mandate of this court, and the refusal of the court to vacate said order, furnish an excuse to the Secretary of the Treasury, to refuse to pay the judgment, and thus work injury to the claimant, John H. Russell.

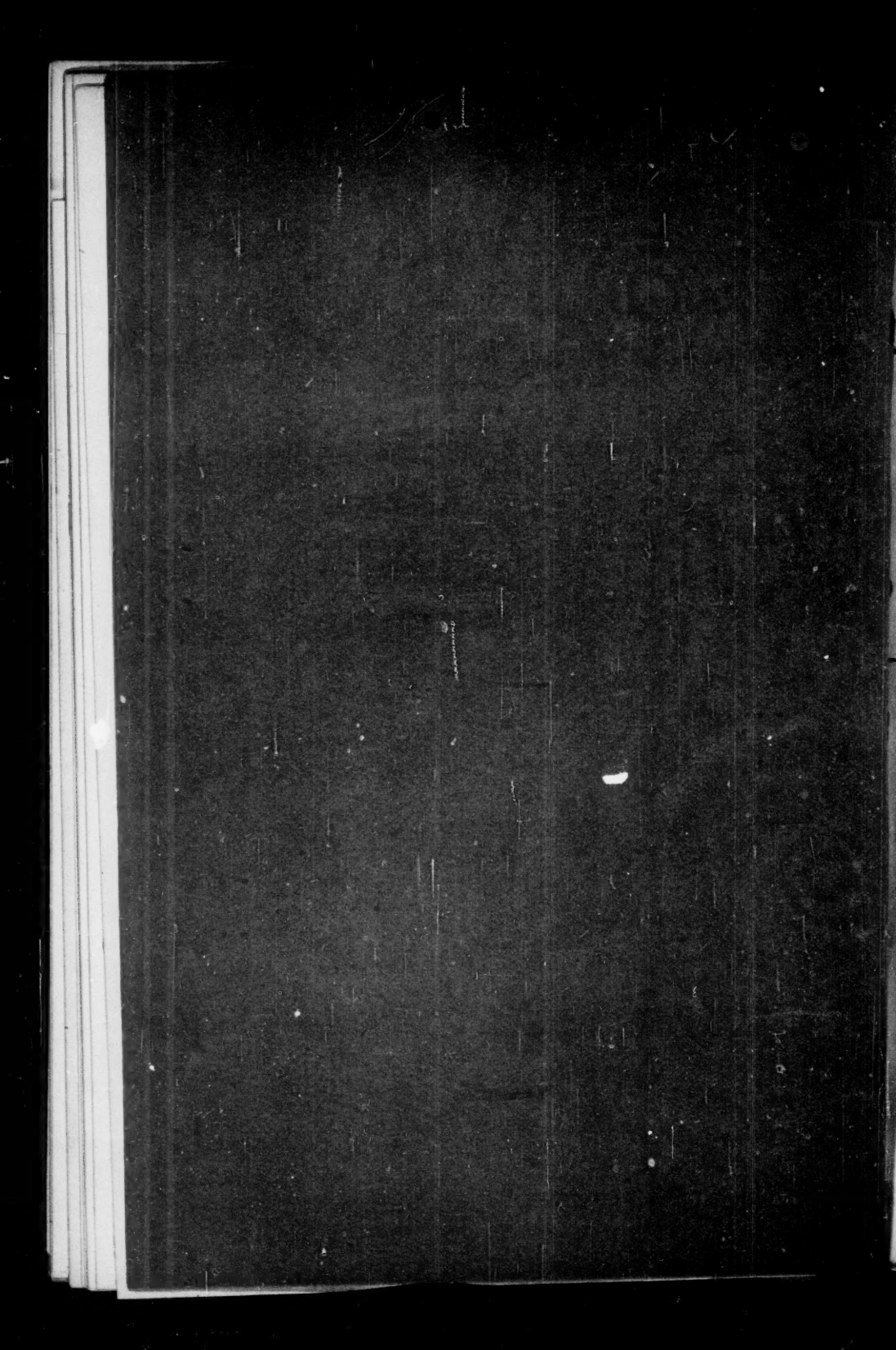
W. PENN. CLARKE,
Of Counsel for J. H. Russell.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

JOHN H. RUSSELL
vs.
THE UNITED STATES.

Brief of the United States on motion of claimant for mandamus.



In the Supreme Court of the United States.

DECEMBER TERM, 1871.

JOHN H. RUSSELL
vs.
THE UNITED STATES.

Brief of the United States on motion of claimant for mandamus.

I.

It appears from the transcript of record, submitted by the plaintiff in this motion, that, on December 6, 1869, John H. Russell recovered a judgment against the United States in the Court of Claims for $41,355 33. From this an appeal was taken by the defendant to this court, and while this appeal was pending, a motion for a new trial in the case was made in the Court of Claims by the Attorney General. This motion having been argued on November 21 and 22, 1871, was subsequently remanded to the law docket of that court for reargument.

On January 29, 1872, the following action was taken by the Court of Claims upon the motion thus remanded, viz:

"*Ordered*, That the defendant's motion for a new trial be dismissed for want of jurisdiction, because, since

the same was made, the mandate of the Supreme Court has been filed, affirming the judgment of the court in this case, and because two of the four judges before whom the the motion was argued, and to whom it was submitted on the 21st November, 1871, have heretofore rendered and filed their decision that the motion be denied upon its merits."

From this judgment the defendant has taken an appeal, and the plaintiff now seeks by mandamus to vacate the order of the Court of Claims, allowing that appeal, assigning three reasons for the issue of the writ of mandamus. These we will consider in the order in which he has stated them.

1. "Appeals from the Court of Claims are only authorized in cases of *final judgment.*"

We contend that the judgment in question comes within the provisions of the law in reference to appeals from the Court of Claims.

Act of March 3, 1863, section 5, 12 U. S. Stats. at Large, 765.

Act of June 25, 1868, section 1, 15 U. S. Stats. at Large, 75.

It is not interlocutory or provisional, but is the final judgment of the court below in the case, and involves, not matters of discretion on the part of that court, but its decision upon two questions of law.

2. The appeal is not from an order of the Court of Claims overruling a motion for a new trial after hearing upon its merits, but is from a judgment dismissing such

a motion for want of jurisdiction. The object of the appeal is not to control the decision of the court below upon the merits of the motion, but to induce a hearing upon it. After hearing before four judges, the motion was remanded to the law docket for a reargument, but, when reached for such reargument, it was dismissed for want of jurisdiction. We desire that it may be heard, and that the reasons for the new trial and the evidence accompanying them may be considered by the Court of Claims. Two grounds are assigned for dismissing the motion, of which the first is, "because since the same was made, the mandate of the Supreme Court has been filed affirming the judgment of the court in this case." This involves a judicial construction of section 2 of the act of June 25, 1868, (15 U. S. Statutes at Large, 75,) which provides:

"That the said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim, and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

And that such construction is the subject of review here has been already decided by the court in the case

of the United States, appellants, *vs.* Cruswell, Nos. 153 and 157, of December term, 1870, where the Chief Justice, in delivering the opinion of the court, said: "The objection that more than two years had elapsed after judgment in the Court of Claims before the motion for a new trial was made should be addressed to that court in opposition to the motion. Its decision, whatever it may be, can be reviewed here."

The second reason assigned for dismissing the motion for a new trial was, "because two of the four judges before whom the motion was argued, and to whom it was submitted on the 21st of November, 1871, have heretofore rendered and filed their decision that the motion be denied upon its merits."

A reference to the transcript of record furnished by the plaintiff in this case (p. 6) will show the following entries:

"*December* 11, 1871.—The Assistant Attorney General filed a motion to remand the motion for a new trial to the law docket for reargument.

"*December* 13, 1871.—Chief Justice Drake announced the opinion of the court, granting a reargument of the motion for a new trial. Judges Peck and Nott dissented. Judge Nott read an opinion."

It will be seen from these entries, and from the judgment which is now appealed from, that the Court of Claims has never, as a court, passed upon the merits of the motion. Their action of December 13, 1871, was to grant a reargument of it. Judges Peck and Nott dissented; but this was the dissent of a minority, and,

so far as the rights of the defendant were concerned, the motion was in the same position as if it had never been argued; and when, more than a month later, it was reached for the reargument which the court had accorded, it was the right of the defendant to be heard upon the merits of the motion. The court might then, upon hearing, overrule the motion upon its merits, but cannot deny that hearing, and dismiss the motion for want of jurisdiction, because a minority of their number had dissented from the action of the court of December 13, 1871, and when they say that they are concluded by that dissenting opinion, and give to it, in the face of the record, the effect of a previous judgment, by which they are estopped, their judgment is properly the subject of appeal, "not for error in the exercise of their discretion, but for the error of deciding that they had no discretion to exercise."

Beach *vs.* Chamberlain and others, 3 Wendell, 366.

And see, also—

McElwain *vs.* Corning, 12 Abbott, 20.

Perdue *vs.* The Mayor, &c., of New York, 12 Abbott, 29.

The Artisan's Bank *vs.* Treadwell, 34 Barbour's Reports, 557.

Powell *vs.* Jopling, 2 North Carolina Reports, (Jones's Law,) 400.

Hillard on New Trials, 575.

3. The third reason given by the plaintiff is, that "The allowance of the appeal is a violation of the mandate of the Supreme Court."

The mandate of the Supreme Court has reference only to the affirmance of the judgment of the Court of Claims of December 6, 1869, and does not affect the rights of the defendant under the first and second sections of the act of June 25, 1868. By the second section of this act the Court of Claims is empowered and, as we contend, directed to grant a new trial to the defendant under certain conditions, "within two years next after the final disposition of any suit or claim." The words "final disposition" in this section do not relate alone to the action of the Court of Claims, but where cases are appealed to the Supreme Court include the disposition of the case by the latter tribunal. A case which is appealed to the Supreme Court cannot be regarded as finally disposed of until the court has expressed its judgment, and the two years recited in the statute are to be measured from that time. In the present case that limitation has not yet expired, and the motion for a new trial was not only made within it, but also within two years from the judgment of December 6, 1869, in the Court of Claims.

II.

Mandamus is an extraordinary remedy, and never allowed where the party has another adequate remedy.

If the allowance of the appeal was improper, the claimant has his remedy in this court, without resorting to the writ of mandamus.

WILLIAM McMICHAEL,
Assistant Attorney General.
B. H. BRISTOW,
Solicitor General.

SUPREME COURT OF THE UNITED STATES.

No. 11.—ORIGINAL.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONERS.

PETITION FOR WRIT OF MANDAMUS OF THE JUDGES OF THE COURT OF CLAIMS.

FILED APRIL 5, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 11.—ORIGINAL.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONERS.

PETITION FOR WRIT OF MANDAMUS OF THE JUDGES OF THE COURT OF CLAIMS.

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1 *Motion for mandamus.*

In the Supreme Court of the United States. December term, 1871.

And now comes the Attorney General, on behalf of the United States, and states that, heretofore, and previous to the sixth day of December, 1869, one John H. Russell commenced his suit in the Court of Claims of the United States, upon an alleged contract with the Government, in which issue was duly joined, and the cause duly tried, in accordance with the rules and practice of said court; and in which case, on the said sixth day of December, 1869, the said court rendered judgment in favor of said claimant for the sum of $41,355.33, Loring, J., dissenting. That, on the sixteenth day of February, 1870, an appeal to this court was allowed by said Court of Claims, and, on the first day of June, 1871, the Assistant Attorney General filed in said court a motion for a new trial in said cause, for the reasons stated in said motion, in pursuance of section two of the act of Congress, approved June 25, 1868, and at the same time filed new and additional material evidence that had come to the knowledge of the Assistant Attorney General since the rendition of said judgment, and which had not been introduced in or used on the trial of said cause.

That, on the eighteenth day of September, 1871, the Assistant Attorney General filed additional reasons for a new trial, with other material evidence that had come to his knowledge since the filing of the said motion for a new trial, which evidence had not been introduced in or used on the trial of said cause.

That, on the eleventh day of November, 1871, the said Assistant Attorney General filed another motion for an order of the court staying the payment of the judgment until the motion for a new trial should be decided.

That, on the twenty-first and twenty-second days of November, 1871, the said motions for a new trial and a stay of judgment were duly argued and submitted to the court.

That, on the eleventh day of December, 1871, and before a decision had been rendered by the court in said motions, or either of them, the said Assistant Attorney General filed another motion to remand the said motions to the law docket for a re-argument, which last motion was allowed by the court on the thirteenth day of December, 1871; and on the nineteenth of December the court ordered said motions to be replaced on the law docket for the month of January, 1872.

That, on the twenty-ninth of January, 1872, the said court rendered its decision on said motion for a new trial, dismissing the same for want of jurisdiction, because, since the same was made, the mandate of the Supreme Court had been filed, affirming the judgment of the Court of Claims in the case, and also because two of the four judges be-

2 fore whom the motion was argued, and to whom it was submitted on the twenty-first of November as aforesaid, had theretofore rendered and filed their decision that the motion be denied upon the merits. All which facts will more fully appear by the certificate of the clerk of the said Court of Claims, already filed in this court, on a motion by claimant's counsel for a mandamus in said case, and to which reference is made.

And the Attorney General now moves the court here for an alternative writ of mandamus directed to the said Court of Claims, commanding said court to hear and decide said motions for a new trial, and for

stay of payment of judgment above referred to, or in default thereof to show cause to the contrary, at a time to be named by this court.

GEO. H. WILLIAMS,
Attorney General.
WILLIAM McMICHAEL,
Assistant Attorney General.

3 EX PARTE: IN THE MATTER OF THE United States, petitioner. } No. 11. Original.

In answer to the rule of the Supreme Court of the United States, in the above matter, made on the 22d day of April, 1872, requiring the judges of the Court of Claims to show cause, on Thursday, the 25th instant, why an alternative writ of mandamus should not issue, directing them to hear and decide certain motions for a new trial, and for stay of payment of judgment, in the case of John H. Russell, petitioner, vs. The United States, the undersigned, the chief justice and judges of said Court of Claims, respectfully submit to the Honorable the Supreme Court of the United States the following statement of the facts connected with the motions specified in said rule, and the action of the Court of Claims and the judges thereof in reference to the first-named of said motions:

On the first day of June, 1871, the Assistant Attorney General of the United States filed in the said Court of Claims, on behalf of the defendants, a motion for a new trial in the case of John H. Russell vs. The United States, and assigned as a ground for said motion that
4 fraud, wrong, and injustice had been done in the premises, in this: that for a part of the amount for which judgment had been rendered by this court in favor of said Russell, his receipt in full had been found in the office of the Third Auditor of the Treasury, which receipt had come to the knowledge of the Attorney General after the rendition of said judgment.

On the 18th of September, 1871, the Assistant Attorney General filed in the clerk's office of the court a specification of additional reasons for a new trial in support of the motion filed by him on the 1st of June, 1871, as aforesaid; one of which specifications indicated that, owing to a variance between the original depositions filed in the cause by the claimant and the printed copies thereof, upon which the judgment was rendered in favor of said Russell, the said judgment was largely in excess of the amount which the said Russell should have recovered, as appeared from the actual evidence in the case, which variance had come to the knowledge of the Attorney General after the rendition of said judgment in favor of said Russell; and the other of said specifications averred that it appeared, from original receipts on file in the office of the
5 Third Auditor of the Treasury, and from original reports on file in the office of the Quartermaster General, copies of which receipts and reports were filed with said specifications, that the steamer, "J. H. Russell," was not seized or impressed into the service of the United States, as alleged by said Russell, and as this court found, but was employed by the United States simply as a common carrier; and that the said Russell had been paid in full for the services of said boat during the time covered by the judgment; and that said receipts & reports first came to the knowledge of the Attorney General after the rendition of said judgment in favor of said Russell.

On the 22d of November, 1871, the said motion for a new trial having been argued on behalf of the defendants in support of it, and on behalf of the said Russell against it, before the court composed of Drake, chief justice, and Loring, Peck, and Nott, judges, was submitted to the court.

In conference thereon the said judges were equally divided in opinion; but the majority of them did not authorize any judgment to be entered in open court upon the motion; nor was any such judgment rendered.

On the 11th of December, 1871, while the said motion was still
6 pending in conference before the judges to whom it had been submitted, the Assistant Attorney General filed a motion in open court to remand the said motion for a new trial to the law docket for a re-argument; and on the 13th day of said month, it was ordered by the majority of the court that a re-argument of the motion for a new trial should be granted; whereupon Judges Peck and Nott dissented, and Judge Nott read in open court and placed on file the following opinion, giving reasons for their dissent:

"RUSSELL
"*vs.*
"THE UNITED STATES.

"PECK and NOTT, JJ.:

"The defendants' motion for a new trial in this case was argued before and submitted to four of the judges of this court for their decision. It was also stated on the argument by the counsel for the claimant, and conceded by the counsel for the defendants, that the Supreme Court had affirmed the judgment of this court. Subsequently, and while the motion was still under advisement, an oral suggestion was made by the Assistant Attorney General that the case be remanded and heard before a full bench, the only legal reason assigned being the decision of the Supreme Court affirming the judgment of this court. The counsel for the claimant objected, on the ground that the decision of the Supreme Court had been known and was announced on the hearing. The suggestion of the Attorney General was not a motion, according to the rules of the court, but it was subsequently reduced to writing and filed.

"We are of the opinion on these facts that the final judgment of this court, affirmed by the Supreme Court, is property which cannot be taken away except by proceedings in due form of law, and that it should be protected by the full discharge of our judicial duty; that the four judges who heard the motion, constitute a tribunal which can alone decide it, and that it is the right of the parties to have it decided by them; that the fifth member of the court, who did not hear it, and to whom it was not submitted, can take no part in its disposition; that the suggestion of the Assistant Attorney General presents no legal or just ground for ordering a re-argument; and that the defendants' motion for a new trial is unjust, inequitable, and contrary to the intent of both the statute and the common law, and it must be denied.

"We are also of the opinion that this decision, by a moiety of the four judges constituting the tribunal that heard the motion, and to which it was submitted, does, ipso facto, deny the motion, according to the constant and invariable practice of this court and of the Supreme Court; and that on its rendition an order should be entered by the court denying the motion."

On the 12th of December, 1871, the attorney of said Russell
7 produced in open court the mandate of the Supreme Court of the United States, affirming the judgment rendered by this court in favor of said Russell, and the same was ordered by this court to be placed on file.

On the 29th of January, 1872, the said motion for a new trial came up before a full bench of this court for re-argument, when a majority of the court decided, for the reasons stated in the following order entered

on the record of the court, that the said motion should be dismissed, the Chief Justice & Loring, judge, dissenting.

"JOHN H. RUSSELL
"*vs.*
"THE UNITED STATES.

"In this case it was ordered that the defendant's motion for a new trial be dismissed for want of jurisdiction, because, since the same was made, the mandate of the Supreme Court has been filed affirming the judgment of the court in this case, and because two of the four judges before whom the motion was argued, and to whom it was submitted on the 21st of November, 1871, have heretofore rendered and filed their decision that the motion be denied upon the merits."

Since the making of this order no action has been taken by
8 this court in reference to said motion for a new trial.

The reasons assigned in said order against the jurisdiction of this court to hear and determine said motion, are the only cause which the majority of the court have to show why the alternative mandamus should not issue from the Supreme Court in this case.

In regard to the motion for stay of payment of judgment in the case of said Russell, which was filed by the Assistant Attorney General, on behalf of the defendants, on the 11th of November, 1871, the undersigned respectfully state that no action has at any time been taken by this court in relation thereto, and it is now on the files of this court undecided. It was a motion to stay payment of said judgment pending the said motion for a new trial, and the Assistant Attorney General has not heretofore called it up for hearing.

April 24, 1872.

C. D. DRAKE.
EDW'D G. LORING.
E. PECK.
CHARLES C. NOTT.
SAM. MILLIGAN.

(Indorsed: Ex parte: In the matter of the United States, petitioner. Answer of the judges of the Court of Claims.

9 And the undersigned for themselves give these additional reasons, against the rule; that the defendants by voluntarily arguing their appeal in the Supreme Court, after having made their several motions in the Court of Claims, which they did not proceed to argue in apt time, and by allowing the Supreme Court to proceed to judgment thereon while their motions in the Court of Claims were still pending, were guilty of experimenting upon the decisions of both courts, in a manner prejudicial to the ends of public justice; and that the course pursued by them in the Supreme Court while their motions in the Court of Claims were still pending, must be deemed a withdrawal of those motions from the latter court. And that it was against the course of justice for the defendants to subject the claimant to the expense and risk of a needless trial in the Supreme Court.

E. PECK.
CHARLES C. NOTT.

10 (Indorsement on cover:) Sup. C't U. S. 1871, Dec. term. No.
11. Orig'l. Ex parte: In the matter of the United States, petitioner. Answer of the judges of the Court of Claims to rule to show causes. Filed Ap'l 25th, 1872.